

E-Filed 5/25/11

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JOSE RAUL RAMIREZ,
Petitioner,
v.
GAIL LEWIS, Warden,
Respondent.

No. C 11-01436 RS (PR)
ORDER REOPENING ACTION;
ORDER TO SHOW CAUSE;
DIRECTIONS TO CLERK

INTRODUCTION

This is a federal habeas corpus action filed pursuant to 28 U.S.C. § 2254 by a *pro se* state prisoner. The petition was dismissed for failure to pay the filing fee or file a proper application to proceed *in forma pauperis*. The filing fee now having been paid, the action is hereby REOPENED. The order of dismissal (Docket No. 3) and the judgment (Docket No. 4) are both hereby VACATED. The petition is now before the Court for review pursuant to 28 U.S.C. § 2243 and Rule 4 of the Rules Governing Section 2254 Cases.

BACKGROUND

According to the petition, in 2004, petitioner pleaded guilty in a Monterey County Superior Court to a charge of car jacking. Consequent to the guilty plea, petitioner was

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1 sentenced to nineteen years in state prison.

2 DISCUSSION

3 This Court may entertain a petition for writ of habeas corpus “in behalf of a person in
4 custody pursuant to the judgment of a State court only on the ground that he is in custody in
5 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).
6 A district court considering an application for a writ of habeas corpus shall “award the writ
7 or issue an order directing the respondent to show cause why the writ should not be granted,
8 unless it appears from the application that the applicant or person detained is not entitled
9 thereto.” 28 U.S.C. § 2243. Summary dismissal is appropriate only where the allegations in
10 the petition are vague or conclusory, palpably incredible, or patently frivolous or false. *See*
11 *Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990).

12 Petitioner claims that the trial court imposed an upper-term sentence in violation of
13 petitioner’s Sixth Amendment rights. Liberally construed, this claim appears to be
14 cognizable in a federal habeas action.

15 CONCLUSION

16 1. The Clerk shall serve by certified mail a copy of this order, the petition and all
17 attachments thereto, on respondent and respondent’s counsel, the Attorney General for the
18 State of California. The Clerk shall also serve a copy of this order on petitioner.

19 2. Respondent shall file with the Court and serve on petitioner, within **ninety (90)**
20 days of the date this order is filed, an answer conforming in all respects to Rule 5 of the
21 Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not
22 be granted based on petitioner’s cognizable claim. Respondent shall file with the answer and
23 serve on petitioner a copy of all portions of the state trial record that previously have been
24 transcribed and that are relevant to a determination of the issues presented by the petition.

25 3. If petitioner wishes to respond to the answer, he shall do so by filing a traverse
26 with the Court and serving it on respondent’s counsel within **thirty (30)** days of the date the
27 answer is filed.

1 4. In lieu of an answer, respondent may file, within **ninety (90)** days of the date this
2 order is filed, a motion to dismiss on procedural grounds, as set forth in the Advisory
3 Committee Notes to Rule 4 of the Rules Governing Section 2254 Cases. If respondent files
4 such a motion, petitioner shall file with the Court and serve on respondent an opposition or
5 statement of non-opposition within **thirty (30)** days of the date the motion is filed, and
6 respondent shall file with the Court and serve on petitioner a reply within **fifteen (15)** days of
7 the date any opposition is filed.

8 5. Petitioner is reminded that all communications with the Court must be served on
9 respondent by mailing a true copy of the document to respondent's counsel.

10 6. It is petitioner's responsibility to prosecute this case. Petitioner must keep the
11 Court and respondent informed of any change of address and must comply with the Court's
12 orders in a timely fashion. Failure to do so may result in the dismissal of this action for
13 failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

14 7. Upon a showing of good cause, requests for a reasonable extension of time will be
15 granted provided they are filed on or before the deadline they seek to extend.

16 8. The Clerk is directed to reopen the action.

17 **IT IS SO ORDERED.**

18 DATED: May 24, 2011


RICHARD SEEBORG
United States District Judge